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DIVISION II

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STATE OF WASHINGTON

No. 48927-9-II

BY 2  
DEPUTY

DIVISION II OF THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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RICHARD BOYD,

Appellant,

v.

CITY OF OLYMPIA, ET AL,

Respondent,

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APPELLANT'S REPLY BRIEF TO DEPARTMENT OF LABOR AND  
INDUSTRIES' RESPONSE BRIEF

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**Other Authority**

## I. ARGUMENT

### 1. Dr. Rao Had Authority to Protest

The Board, in its significant decision of *In Re: Harry D. Pittis, BIIA Dec., 88 3651 (1989)*, made it clear that WAC 296-20-09701 was intended as a delegation of authority by the Department to self-insured employers to receive, on behalf of the Department, from **attending doctors**, requests for reconsideration based on medical reasons.

“An examination of WAC 296-20-09701 clearly reveals that it was intended as a delegation of authority by the Department to self insured employers to receive, on behalf of the Department, **attending doctors’ requests for reconsideration** based on medical reasons. Since the delegation was created through the rule-making process, all interested parties and those whose rights may be affected were put on notice of the Department’s intent to essentially make self-insured employers the Department’s agent for receipt of requests for reconsideration **made by attending physicians** for medical reasons, in self-insured claims.” [bold emphasis added]. *In Re: Harry D. Pittis, BIIA number, 883651 (1989)*.

An “attending doctor” means: “a person licensed to independently practice one or more of the following professions: Medicine and surgery; osteopathic medicine and surgery; chiropractic; naturopathic physician; podiatry; dentistry; optometry.” *See WAC 296-20-01002 Definitions*. Moreover, this definition also states that: “An attending doctor is a treating doctor.” *Id.*

An “attending physician” means “any person licensed to perform one

or more of the following professions: Medicine and surgery; or osteopathic medicine and surgery. An AP is a treating physician.” See WAC 296-20-01002. *Definitions.*

**Nowhere** in the definition of “attending physician” and “attending doctor” is a requirement that the doctor must have been “selected” as the attending physician from the provider network by the injured worker.

By statutory definition, Dr., Rao is an attending doctor/attending physician. The Department, however, advances a narrow and conservative construction of the Industrial Insurance Act and would have the Court place the benefit of doubt on the Self Insured Employer – opposed to the injured worker. However,

“The legislature has instructed us that the act “**shall be liberally construed** for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.” RCW 51.12.010. To accomplish the legislative objective, our “guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to **be liberally construed** in order to achieve its purpose of providing compensation to all covered employees injured in their employment, **with doubts resolved in favor of the worker.**” *Cockle v. Dep't of Labor & Indus.*, 142 Wash.2d 801, 811, 16 P.3d 583 (2001) (quoting *Dennis v. Dep't of Labor & Indus.*, 109 Wash.2d 467, 470, 745 P.2d 1295 (1987)).” [bold emphasis added].

*Michaels v. CH2M Hill, Inc.*, 171 Wash. 2d 587, 598, 257 P.3d 532 (2011).

The Department asserts that **Dr. Lee** is the attending physician, and

it advances an argument that Dr. Rao is just a *treating* physician and cannot protest the Department order. However, the Department must recognize that the even the Claims Examiner Carrie Fleischman indicated in her Affidavit that she received a chart note by **John Green III, M.D.**, (not Dr. Lee) dated September 24, 2013, that the chart note indicated that Mr. Boyd would be referred for an injection and physical therapy, and that the October 10, 2013 **closure order was held in abeyance.** CABR 352.

SIE counsel states: "That said, **Dr. Green** did recommend an IME and a referral for an injection. **It was felt that this chart note could constitute a protest** to the October 10, 2013 Department order closing the claim with a Category IV PPD award as it was received after the order was issued. **Therefore, the closing order was held in abeyance** and efforts were made to fully investigate whether Dr. Green was recommending further treatment under the claim or outside of the claim." CABR 348. **[Bold emphasis added]**. Even the jurisdictional history at CABR 328 provides in part:

Provider Dr. John Robert Green III; Service date 9/24/13; referring claimant to one of his partners for an ultrasound-guided injection of both his psoas and his greater Trochanteric bursa, and then to physical therapy for stretching and strengthening both his psoas and hip abductors, iliotibial band. (Faxed to employer representative.) (Scanned 1/2/14; page 2.)

Employer (ST Wallace, Jr. -- Atty) Indicates that the self-insured employer received the enclosed chart note by Dr. Green on 10/31/13, and that the chart note will likely be construed as a protest to the closing order. (Faxed)

**2. Dr. Rao was an “Other Person Aggrieved” by the closing order.**

Dr. Roa has the lawful authority to bring a request for reconsideration of a Department’s closure order. RCW 51.52.050(2)(a) allows a request for reconsideration of any action or decision of the Department related to any phase of the administration of Title 51 to be made by the “worker, beneficiary, employer, or other person aggrieved thereby”.  
*RCW 51.52.050(2)(a).*

RCW 51.52.050(2)(b)(I)<sup>1</sup> states in part, “If upon reconsideration requested by a worker **or medical provider**, . . .” [bold emphasis added]. This clearly contemplates that a medical provider can be an aggrieved party.

The SIE contends that it did not pay Dr. Roa for his February 13, 2014 injection of Mr. Boyd. CABR 346. Dr. Roa is a person “aggrieved” by the Department’s February 18, 2014 Order.

RCW 51.52.050(2)(a) uses the term “any person aggrieved thereby” in the context *of any action or decision of the Department related to any phase of the administration of Title 51*. “The Department or self-insurer pays for proper and necessary health care services that are related to the diagnosis and treatment of an accepted condition.” WAC 296-20-01002. Dr.

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1

Correct statutory citation - this corrects the citation at P.14 of Opening Brief.

Roa has a right to payment (a pecuniary right) by the Department of self-insurer for his February 13, 2014 treatment. His right is substantially affected by the Department's decision to pre-maturely close Mr. Boyd's claim. That decision affirmed the January 27, 2014 order, which ordered that Mr. Boyd's covered medical condition was "stable." CABR 82. The Department did not pay Dr. Roa for his February 13, 2014 injection of Mr. Boyd. CABR 346. Dr. Roa is aggrieved by the order. The protest is considered at the time it was made, not by subsequent after the fact ex parte derived statements.

The Department also argues that because the Dr. Roa treatment was before the Department closed the claim, payment of that bill would not be inconsistent with Department's decision to close the claim. This misses the point. The chart note called for ongoing care (care that goes beyond the February 18, 2014 closure date) – and it and the bill were sent to the Claims Examiner. It clearly establishes that Mr. Boyd's condition is not only related to the industrial injury but was not "stable."

In its Response Brief, the Department (a) claims that "If the sender does not want to protest a Department decision, he or she is not aggrieved" and (b) asserts that Dr. Rao submitted the chart note and bill, "but when he was asked to file a separate protest (if he felt aggrieved) he did not, . . .". *Department Response Brief, p. 14*. Both of these contentions revolve around

whether or not there was an “intent” to protest.

However, whether Dr. Roa **wanted** to protest the order is not the proper question. The question is whether the chart note was reasonably calculated to put the Department on notice that the party submitting the document is requesting action inconsistent with the Department’s order. *See In Re: Mike Lambert, BIIA No. 91 0107 (January, 1991).* Late-inning gathering of Declarations, signed **roughly one year after** the Claims Examiner received the protest record, are irrelevant as to how the protest is considered at the time the protest is filed. This is the SIE’s and the AG’s red herring.

Moreover, once the Claims Examiner received the protest record, the SIE should not get to take a second or third bite at disavowing the protest by sending a post-protest inquiry letter to the protesting doctor. It should have sent the record to the Department. An abeyance of the Department order should have occurred.

**3. The Protest Record was Reasonably Calculated to Put the Department on Notice That the Party Submitting the Document is Requesting Action Inconsistent With the Department’s Order.**

The Dr. Roa chart note and bill was sent to Claims Examiner Carrie Fleishmann. Why send the chart note *and bill* to the Claims Examiner if Dr. Roa felt that the treatment rendered was not part of the claim? This

undercuts the Department's implication at page 14 of its Response Brief that Dr. Rao did not "want to" protest the order.

Notably, the Department even states at page 16 of its Response Brief: "First, when reviewing the document itself to see whether it provided the Department with adequate notice, **it is not necessary to speculate about the subjective intent of the person sending the document.** Indeed **subjective intent is not relevant** to that particular inquiry, which is limited to whether the chart note and bill put the Department or the City on notice that "the party submitting the document is requesting action inconsistent with the decision of the Department.'" *Department Response Brief*, p.16. [Bold emphasis added].

Any notion that, upon receiving the Dr. Rao protest record, Claims Examiner Carrie Fleischman believed the record not to be a protest does not comport with her own letter dated March 28, 2014. The Department contends that Ms. Fleishmann was "fully aware" that the condition was not related to the industrial injury based on information that was provided before she received the February 13, 2014 chart note and bill from Dr. Rao. *See Department Response Brief*, p. 20. However, Ms. Fleischman's March 28, 2014 letter to Dr. Rao states in part: "It is unclear whether there was simply miscommunication regarding the billing party, or whether you intended to

protest/appeal the closing order.” CABR 330 and 168.

The Department contends that the treatment received by Dr. Rao was unrelated to Mr. Boyd’s industrial injury. The Department asserts that the evidence in the record shows that Boyd injured his low-back and he was provided treatment and a permanent partial disability award for that condition. *Department Response Brief at p.17 -18.* First, “. . .The department or self-insurer pays for proper and necessary health care services that are *related to* the diagnosis and treatment of an accepted condition.” *WAC 296-20-01002.* [Italics emphasis added]. The SIE and Department cannot ignore that *on the face of* the Dr. Rao protest record, under “HPI:” it states in part: “His history is complicated somewhat by back pain and suspected lumbarradiculopathy, affecting the calf, causing atrophy, for which he’s seen Dr. Michael Lee.” CABR 333.

Second, the protest record indicates that (a) That the 2/13/14 office visit was **Occupational** Health; (b) that the chief complaint was “**Ongoing L hip**, referral by Dr. Green”; (c) that Mr. Boyd was presenting for **follow up of left hip pain**; (d) that Mr. Boyd had arthroscopic labraldebridement, in early 2012, and last met Dr. Roa for a diagnostic hip injection, and that he did get several months of benefit from the surgery but that **the** pain has since returned; (e) His history is complicated somewhat by back pain and suspected

lumbarradiculopathy; (f) that at this February 13, 2014 visit, Mr Boyd received a hip injection; and (g) that Dr. Roa directed Mr. Boyd to continue home exercise physical therapy and to follow up in four to six weeks to consider psoas vsintra-articular injection if he is not improving. CABR 588-592; 110-114. **[Bold emphasis added]**.

Even Claims Examiner Carrie Fleishman sent a letter to Dr. Roa after receiving his bill, informing him that “The self-insurer received your bill and chart note after the closing order was issued. It is unclear whether there was simply miscommunication regarding the billing party, or whether you intended to protest/appeal the closing order.” CABR 330 and 168. Accordingly, Ms. Fleishmann arrived at two possible options regarding Dr. Roa’s chart note: (1) miscommunication regarding the billing party or (2) Dr. Roa intended to protest. Dr. Roa’s protest record sent to the Claims Examiner was *reasonably calculated* to put the SIE on notice that action was requested that was inconsistent with the Department order that deemed Mr. Boyd “stable.”

The Department cites to the Declaration of Dr. Roa in its effort to distance Mr. Boyd’s “hip conditions” to the industrial injury. This should be disregarded by the Court, as this Declaration was not even signed until February 24, 2015, roughly *one year after* the date of the protest record. This

late-inning Declaration is not objective evidence that was presented to the Claims Examiner at the time of the protest. It is irrelevant.

In its effort to distance the “hip conditions” from the industrial injury, the Department also claims that Dr. Green “says it is unrelated”. However, the Department cannot have it both ways. The Department’s claim – that when reviewing the document to see whether it provided the Department with adequate notice, subjective intent of the person sending the protest record is irrelevant – should also apply to Dr. Green’s subjective belief. *See Department Response Brief, at p.16.* Moreover, the protest record is not that of Dr. Greens, but rather Dr. Roa.

The Department argues that the City is allowed by WAC 296-20-055 to provide treatment for unrelated conditions that may be retarding recovery of the accepted industrial injury without accepting responsibility for the condition. First, the Court should not accept the Department’s underlying implication that the treatment provided by Dr. Roa was not *related* to the industrial injury. Second, WAC 296-20-055 also states, in part: “A thorough explanation of how the unrelated condition is affecting the industrial condition must be included with the request for authorization.” *WAC 296-20-055(3)*. Accordingly, if the Department is going to invoke WAC 296-20-055 in an attempt to create a divide between “hip conditions” and industrial

injury, the Court should take note of whether the Department has proven that there was “A thorough explanation of how the unrelated condition is affecting the industrial condition” – a requirement of WAC 296-20-055.

The Department argues that a chart note that reports a treatment provided before the closing date is consistent with the conclusion that a worker was at maximum medical improvement. *Department Response Brief at p.20*. However, the Dr. Roa protest record was dated February 13, 2014. The closing order was February 18, 2014 (a five day gap). The protest record, however, called for continued home physical therapy, and for Mr. Boyd to follow up in “4-6 weeks to consider psoas vsintra-articular injection if not improving.” CABR 588 & 110. This protest record clearly indicates a call for additional treatment beyond the Department’s February 18, 2014 closing order – which is inconsistent with the Department’s order.

#### **4. Public Policy Favors the Injured Worker.**

The main issue in the present case is whether the Department’s February 18, 2014 Order was timely protested and should have been held in abeyance until a subsequent order was issued. Accordingly, the present case involves in large part interpretation of the Industrial Insurance Act. This Court should construe the Act and regulations, including RCW 51.52.050, 51.52.102, 51.52.100, RCW 51.52.060, WAC 296-20-09701, WAC 296-20-

01002, WAC 263-12-135, liberally, with all doubts in favor of the injured worker. Liberal construction has been affirmed by Courts time and again, and by our State Supreme Court as recently as this year:

“The **IIA is broad in scope** and contains a **mandate of liberal construction** ‘for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.’” *Id.* (quoting RCW 51.12.010). **The liberal construction of the IIA necessitates that all doubts be resolved in favor of coverage.** *Id.* at 532, 120 P.3d 941. Further, the “guiding principle” when interpreting provisions of the IIA is that it is a remedial statute that is “to be **liberally construed** in order to achieve its purpose of providing compensation to all covered employees injured in their employment, **with doubts resolved in favor of the worker.**” [Bold emphasis added].

*Dep't of Labor & Indus. of State v. Lyons Enterprises Inc.*, 185 Wash. 2d 721, 734, 374 P.3d 1097, (2016), as amended (July 13, 2016), reconsideration denied (July 14, 2016). The Board and Superior Court, when construing the IIA in this case, should construe it liberally, rather than narrowly – and doubt should fall on the side of Mr. Boyd, not the self insured employer. The position taken by government is inconsistent with the Supreme Court’s mandate.

## **5. Excluded Evidence**

See section I(2)(b) of Mr. Boyd’s Reply Brief to the SIE’s Response Brief. The Department cites to WAC 263-12-135. Notably, WAC 263-12-135 provides in part, “The record in any appeal disposed of by order denying

appeal or order granting relief on the record as provided in RCW 51.52.080, shall include those documents **found in the department record** that are relevant to the board's disposition.” *WAC 263-12-135*.**[Bold emphasis added]**. The Department makes decisions as a quasi judicial entity and it considers all evidence in the record. The Claimant should not be prevented from calling the Court’s attention to this record.

#### **6. Judicial Estoppel**

“. . . Since the delegation was created through the rule-making process, all interested parties and those whose rights may be affected were put on notice of the Department’s intent to essentially make **self-insured employers the Department’s agent** for receipt of requests for reconsideration made by attending physicians for medical reasons, in self-insured claims.” **[Bold emphasis added]**. *In Re: Harry D. Pittis, BIIA number, 883651 (1989)*.

The Department attempts to distance itself from litigation to avoid judicial estoppel. However, the Department is a quasi-judicial agency that adjudicates workers compensation claims, makes legal decisions that affect claims, issues orders and affects benefits.

The Department has apparently treated *Dr. Green's* 9/24/13 chart note as a protest. *See CABR 328 showing that the Department 10/10/13 Order*

*was reversed.* While the Dr. Green chart note mentioned Mr. Boyd's L&I claim, the chart note did not identify Mr. Boyd's L&I claim number, did not identify a claims manager or claims adjudicator, did not identify or even refer to any Department order, and did not state that it was a protest. CABR 84.

Clearly, it benefits the Department to challenge Dr. Roa's chart note as a protest and to challenge his authority to protest – because the longer the claim stays open the greater the likelihood of additional work and resources for the Department.

#### **7. Attorney's Fees:**

The Board decided that Mr. Boyd did not file a written request for reconsideration with the Department within the time allowed by RCW 51.52.050 and it also dismissed his appeal. CABR 6 & 7. The Superior Court affirmed the Board's decision. Accordingly, if the Superior Court and Board are reversed, Mr. Boyd's claim remains open at the Department and he has therefore prevailed on his appeal. Bringing a claim back to life is the statutory equivalent of prevailing. If not for the appeal, the Claimant loses. The attorney fees are to prevent the Claimant from losing ground for challenging an employer or Department decision.

## **II. CONCLUSION**


The February 13, 2014 Dr. Roa protest constitutes a protest of the

Department's closure order. The SIE should have submitted it to the Department and the Department's order should have been placed in abeyance. There should be no "appeal deadline" until after the Department issues a final appealable order. The protest in this circumstance is the equivalent of the protest recognized earlier in the claim process. Inconsistent conduct by the government employers should be recognized and prohibited. The Claimant's physician made a similar protest and should be treated as an equal to others acting in markedly similar circumstances.

Firefighter Boyd is entitled to full benefits under the law, up to and including pension. The Board and Superior Court should be reversed. This case should be remanded back to the Department because the Board lacks jurisdiction.

DATED: December 23, 2016

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DECLARATION OF SERVICE OF  
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I declare under penalty of perjury under the laws of the State of Washington that on the date stated below I caused the documents referenced below to be served in the manners indicated below on the following:

DOCUMENTS:        1.        Appellant's Reply Brief to Department; and  
                             2.        This Declaration of Service.

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Washington State Court of Appeals Division II

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